A NEW FIDELITY TO THE REGULATORY IDEAL

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As originally conceived, the independent agencies were designed to protect the consumer. Commissioner Johnson examines their failure to respond adequately to consumer interests and concludes the original theory has not been allowed to work. Rather than dismantling our agencies, Commissioner Johnson suggests remedies to bring us closer to the original regulatory ideal. He details ideas for greater citizen participation, stronger policy planning, more agency independence, insulation from industry orientation, and sterner judicial and legislative review.

As our big, bustling nation races through the dawn of the new decade into 1971, the American people seem peculiarly melancholy.[1] Our government is failing us.[2]

The stamp of failure is writ large across the work of our administrative agencies. One dramatic current case in point is the Interstate Com-

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1 The message comes from many tongues in many parts of the land. National news magazines do cover stories on "What ails the American spirit." Goldman, *Six Historians Reflect on What Ails The American Spirit*, NEWSWEEK, July 6, 1970, at 19. *Cf. Reflections on the Madness of the Age*, Wall Street Journal, Sept. 14, 1970, at 16, col. 1. The politicians talk of a pronounced psychic downturn, a recession of the spirit. Historian Richard Hofstadter calls the 1960's "the Age of Rubbish." Hofstadter, *The Age of Rubbish*, NEWSWEEK, July 6, 1970, at 20, 23. He asserts that the American malaise is attributable to the numerous major problems confronting the nation—"a staggering parcel of questions for one society to have to tackle at one time." *Id.* at 21. Historian Andrew Hacker speaks of our time as "the end of the American era." Hacker, *We Will Meet as Enemies*, NEWSWEEK, July 6, 1970, at 24. No one has captured the mood better than journalist Nicholas von Hoffman: "The preachers and the hawkers forecast the apocalypse, yet the premonitions that come from our daily life experiences—waiting in the supermarket checkout line, calling a policeman, getting automobile insurance—these all tell us that what's building up for us isn't the Grand Revolution but the Great Disintegration." von Hoffman, *If the Senate Changes Hands*, Washington Post, Aug. 28, 1970, § B, at 1, col. 1, at § B, at 15, col. 4.

2 "[S]tate governments are mostly feeble, . . . state legislatures are in dire need of redesign, . . . city government is archaic, . . . the Congress of the United States is in grave need of overhaul, . . . the parties are virtually useless as instruments of the popular will. . . . America is not the nation it set out to be. And we will never get back on course until we take some tough, realistic steps to revitalize our institutions." Letter from John W. Gardner to 200,000 Plus Americans, Soliciting Members for *Common Cause* (Fall 1970) (copy on file with author); *see Gardner Builds a Citizens Lobby*, BUSINESS WEEK, Oct. 31, 1970, at 25.

merce Commission. The thunderous collapse of the Penn Central in June 1970[3] at first appeared not to involve the ICC. Only later did it become clear that the Penn Central's high speed collision with bankruptcy—the largest business failure in history—illustrates how regulators can help ruin a railroad. Court-appointed trustees picking through the wreckage are finding a number of people to blame for the crash—including the regulators who asked too few questions too late.[4]

Senator William Proxmire, the Wisconsin Democrat, was so disturbed at the collapse of the Penn Central that he called for abolition of the ICC,[5] stating that the agency has "failed and failed dismally." [6] The *Washington Post* adds that a report "circulating within the agency for nearly a year had reportedly concluded that many of the railroad mergers and reorganizations approved in recent years had not been in the public interest." [7] Yet the Penn Central merger was approved. The ICC looked the other way while the railroad's status was disguised by "accepted principles of accounting;" [8] and it "ignored the Penn Central's rapidly deteriorating treasury." [9] As a result of similar ICC regulation, a "transportation crisis of unprecedented magnitude" is foreseen within the next few years.[10]

Commissions caught in crisis range from the ICC and FCC to the Federal Trade Commission, the Federal Power Commission, the Civil Aeronautics Board, and perhaps even the Securities and Exchange Commission. The possibilities of another Penn Central collapse in one of our other large regulated industries loom large indeed. Financial problems in the airline industry caused the Chairman of the CAB to mention the possibility of a "flying Penn Central." [11] Electric power and gas shortage problems plague the FPC. Increasing difficulties with the quality of telephone service confront the FCC and many state commis-

[3] For a detailed account of the failure, see Loving, *The Penn Central Bankruptcy Express*, FORTUNE, Aug. 1970, at 104; Wall Street Journal, Sept. 14, 1970, at 16, col. 3; Washington Post, Sept. 16, 1970, § C, at 1, col. 6.

[4] R. FELLMETH, THE INTERSTATE COMMERCE COMMISSION 92-96 (1970) (Ralph Nader's Study Group Report on the ICC).

[5] Transcript of TV Interview with Senator William Proxmire on "Face the Nation", June 28, 1970, at 13 (copy on file with author).

[6] *Id.*

[7] Washington Post, June 29, 1970, § A, at 3, col. 1.

[8] Loving, *supra* note 3, at 164.

[9] *Id.* at 171.

[10] N.Y. Times, Dec. 8, 1970, at 71, col. 7. Senator Mansfield has declared that "the nation is falling into a transportation morass from which certain segments of the economy may never recover." *Id.* at 72, col. 4.

[11] "Civil Aeronautics Board Chairman Secor Browne mentioned the possibility a few weeks ago of 'a flying Penn Central' going down 'in a sea of red.' The airlines are indeed becoming railroads in the sky." Robertson, *Fasten Your Seat Belts*, NEW REPUBLIC, Jan. 9, 1971, at 17.

sions. Over the past few years the FTC has been under mounting fire for abdicating its role as the consumer's champion.[12]

Two illustrations of failure at the Federal Communications Commission—the allocation of frequencies and the process of renewing broadcast licenses—illuminate the nature of the crisis. The FCC is charged by the Communications Act with responsibility for the efficient, equitable allocation of radio frequencies between competing users—from taxicabs and radio amateurs to television stations and microwave relay towers.[13] This task requires information about present utilization of the radio spectrum,[14] the value of the spectrum to different users, engineering knowledge about possible alternative allocations, new and more efficient equipment, and economic decisionmaking involving a balancing of all of the criteria. The FCC is a substitute for the more usual free market allocation of natural resources. Who gets the spectrum and under what conditions has obvious effects on technology. Decisions to design equipment to operate on wider frequency band-widths or narrower, higher or lower frequencies, with greater or lesser power—or even to go to forms of cable transmission—result from FCC decisions.

These decisions, by the FCC and the industries it affects, have a multi-billion dollar influence on our gross national product. The telephone company's revenue is about $17 billion.[15] In 1969 alone homeowners purchased over $2½ billion worth of television receivers.[16] Mobile radio is absolutely essential to the commercial airline industry and local police departments, and some have estimated that in any operation involving moving equipment, from fork-lift trucks in a warehouse to fire-fighting helicopters and police patrol cars, mobile radio makes possible a 40 percent savings in equipment.[17] All told, it is estimated to save the national economy something on the order of eight to 13 billion dollars

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12 With the appointment of a new Federal Trade Commission chairman, Miles W. Kirkpatrick, the Commission for the first time in several decades is showing new signs of life; presumably this comes in response to the renewed tempo of criticism in recent years and the threat that the FTC will be dismembered—her functions distributed among other agencies. NEWSWEEK, Dec. 14, 1970, at 87, 89; *see* N.Y. Times, Aug. 12, 1970, at 1, col. 7. In an unprecedented move, the FTC has decided to allow consumer groups to intervene in Commission proceedings on behalf of the public in agency actions against business. Washington Post, Oct. 27, 1970, § A, at 1, col. 5.

13 Communications Act of 1934, 47 U.S.C. §§ 301, 303 (1964).

14 "The radio spectrum refers to the full range of radio waves that may theoretically be used to transmit information by electromagnetic energy." Levin, *New Technology and the Old Regulation in Radio Spectrum Management*, 56 AM. ECON. REV. PAPERS & PROC. 339 (1966).

15 Wall Street Journal, Feb. 4, 1971, at 7, col. 1.

16 40 TELEVISION DIGEST, INC., TELEVISION FACTBOOK 62a (1971).

17 1 FEDERAL COMMUNICATIONS COMM'N, REPORT OF THE ADVISORY COMM'N FOR THE LAND MOBILE RADIO SERVICES 24 (1967); *id.* vol. 2, pt. 2, at 421; *see id.* vol. 2, pt. 9, at 394-423.

annually. How many users there can be, how much their equipment will cost, the congestion of the frequencies they share with others, and how rapidly new technology and systems are evolved are all functions of the FCC's capacity to come forward with the data and rational analysis necessary to avoid waste and to promote the most efficient and rational allocation of frequencies. This it has failed to do.[18]

Year by year the studies accumulate, each asserting the need for a response to a growing national crisis.[19] Year by year the Commission continues in essentially the same regulatory mold. The FCC does not possess even the most fundamental of basic data; the results of regular monitoring of channel occupancy, for example, or the antenna location height and transmitter power data necessary to predict efficient use in an operation that exists in geographical space, frequency space, and time. It does not have a rational policy statement to use in allocating between competing uses.

Even if it had such information, the process of decisionmaking at the Commission is not one to engender confidence. Spectrum regulation is perceived as a technical engineering and legal exercise devoid of economic analysis. The problem is not that the economists dealing with spectrum management are not qualified; the problem is that there are no economists to deal with these questions. The decisionmaking framework simply does not allow for rational choices among competing uses of the spectrum. Without economic analysis to evaluate the data it possesses, the FCC's spectrum allocation degenerates into a wasteful ritual.[20]

This failure is not unique to the FCC. Similar decisions are made almost daily by Government. Should we develop the SST?; High speed

[18] Professor Hyman Goldin has described the present system of spectrum allocation as "ritualistic, formalistic, wasteful and inefficient." Goldin, *Discussion of "Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues" (Coase)*, 41 LAND ECON. 167, 168 (1965). Another author has observed that the FCC, "created years ago to protect the public resource of radio spectrum space, can be reasonably accused of squandering that resource in regulating the commercial television industry." Kohlmeier, *The Regulatory Agencies: What Should be Done?*, WASHINGTON MONTHLY, Aug. 1969, at 43, 44. *See generally* L. KOHLMEIER, THE REGULATORS 203-209 (1969).

[19] *See generally* FEDERAL COMMUNICATIONS COMM'N, REPORT, *supra* note 17; JOINT TECHNICAL ADVISORY COMM. OF THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS AND ELECTRONIC INDUSTRIES ASS'N, RADIO SPECTRUM UTILIZATION (1964); JOINT TECHNICAL ADVISORY COMM. OF THE INSTITUTE OF RADIO ENGINEERS AND RADIO-TELEVISION MANUFACTURERS ASS'N, RADIO SPECTRUM CONSERVATION (1952); PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT, at ch. 8 (1968).

[20] For a more detailed study of the problem of frequency allocation, see Johnson, *Tower of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 LAW & CONTEMP. PROB. 505 (1969).

passenger trains? Should we give tax advantages to firms with pollution control equipment? Should the Government require safety equipment on cars, trains, and planes? Is desalinization a fruitful source of fresh water? The Government clearly is a primary influence on the development of modern technology; in the determination of rates, routes, or award of monopoly privilege; as a consumer; in writing matching-fund grants; in awarding subsidies; in setting standards and specifications; and in the funding of research and development, policy studies, and pilot studies. All too often such decisions are based upon inadequate data and made without sufficient economic analysis of alternative courses of action.

In the license renewal process, numerous examples illustrate the breakdown of the adversary process at the FCC. In a relatively minor case, I wrote a dissenting opinion discussing the enormous advantages possessed by industry interests in the FCC decisionmaking process.[21] At that time, the Commission's rules provided for a 90-day period preceding the renewal of a station's license, during which time interested parties could file petitions. The industry requested the Commission to reduce this period to 75 days. After a formal rulemaking, in which all interested parties were invited to file comments, the FCC decided that the period should be 60 days.[22]

Was the public given a chance to participate in this proceeding? It is true that the procedure contemplates that anyone—rich or poor, influential or noninfluential—will be heard by the Commission. But what was the actual situation? We released our notice of proposed rulemaking on March 20, 1969, and asked that comments be filed by April 11, 1969, and reply comments by April 18, 1969.[23] Interested parties wishing to comment on our proposed rule were thus given only 22 days in which to find out about it—itself no easy task without a Washington lawyer to collect all Commission documents as they are released, scan them for material relevant to clients, and notify those clients of the need for submission of views—and to draft comments. The response was typical of most rulemaking proceedings before the Commission. In support of our pro-industry rule, the Commission received comments on behalf of 166 broadcast stations,[24] three networks, and one Washington, D.C. law firm with numerous broadcast clients.[25] On the pub-

[21] Broadcast License Renewal Applications, 20 F.C.C.2d 191, 197, 199-200 (1969) (Johnson, dissenting).

[22] *Id.* at 193.

[23] 34 Fed. Reg. 7964 (1969).

[24] Of the total number of stations there were 67 AM, 52 FM, and 47 TV. Broadcast License Renewal Applications, 20 F.C.C.2d 191, 199 (1969).

[25] *Id.* at 199.

lic's behalf, the rule was opposed by only two groups: the United Church of Christ, filing a six page document, and the National Citizens Committee for Broadcasting, filing a three-paragraph letter.[26]

This under-representation of the public has been the norm at the FCC for decades. Day after day, the Commission is bombarded by the most sophisticated legal and policy arguments on the industry's side, and very little on the side of the public. We pretend that the FCC functions in a quasi-judicial capacity and we pay lip-service to the jurisprudential notion that truth will usually emerge from the confrontation of opposing views before a neutral tribunal. I do not dispute this concept; I do not find it archaic as do some. But I am distressed by what I observe happening in practice.

What happens at the FCC—and I imagine at most other administrative agencies—is far from the conceptually satisfying theory contemplated by advocates of the adversary process. In terms of the legal and economic talent arrayed against it before this Commission, the public is scarcely represented at all. The battle is not just uneven; it is seldom even drawn. The issue in question is rarely joined.

Little wonder, then, that the vested interests, while often grumbling about "governmental interference," really have been quite happy with the commission form of decisionmaking. The commissions' industry-orientation has helped regulated industries to deal with political realities that otherwise might prove to be more than a nuisance. Attorney General Olney, advising a railroad president before the turn of the century about the grandfather of all regulatory commissions, the ICC, soothed and educated him with this reasoning:

> My impression would be that looking at the matter [abolition of the ICC] from a railroad point of view exclusively it would not be a wise thing to undertake. . . . The attempt would not be likely to succeed; if it did not succeed, and were made on the ground of the inefficiency and uselessness of the Commission, the result would very probably be giving it the power it now lacks. The Commission, as its functions have now been limited by the courts, is, and can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation

[26] *Id.* at 199-200.

> hostile to railroad interests . . . . The part of wisdom is not to destroy the Commission, but to utilize it.[27]

THE INDEPENDENT REGULATORY IDEAL AND WHY IT HASN'T WORKED

The legal architects of the independent agencies did not foresee a regulatory process engulfed and dominated by the industries regulated. As originally conceived, the agencies were to protect the consumer's interests. The architects had in mind a fourth branch of government, one that could stand alongside the executive, the legislative, and the judicial branches as an independent sentinel guarding the consumer's civil rights. James Landis, the great student of administrative law and late Dean of the Harvard Law School, stressed that the administrative process "is not, as some suppose, simply an extension of executive power . . . . In the grant to it of that full ambit of authority necessary for it in order to plan, to promote, and to police, it presents an assemblage of rights normally exercisable by government as a whole." [28] The theory, then, was to confer upon independent commissions and commissioners the powers of prosecution, legislation, and judgment in pursuit of the public interest.

Why has the system not worked? The failure stems largely from the cumulative effect of four fundamental inadequacies that have conspired unwittingly to hinder the administrative process. First, due to insufficient citizen participation and inadequate investigative facilities, the agencies lack the necessary facts for adequate decisionmaking. Second, regulatory decisionmaking is dominated by the so-called "subgovernmental phenomenon." Third, decisions tend to be made ad hoc rather than as the implementation of a conscious, well-developed policy. Finally, reform movements which do arise tend to suffocate under the weight of regulatory delay. This article will examine these inadequacies and will thereupon suggest a program of reform to bring us closer to the original regulatory ideal.

THE LACK OF FACTS

The commissions too often find themselves groping their way into the future along pathways illuminated by too few facts. Inadequate investigatory facilities and the simple lack of will to fully analyze a

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[27] Letter from United States Attorney General Richard Olney to Charles E. Perkins, President of the Chicago, Burlington and Quincy Railroad, Dec. 28, 1892, *quoted in* M. JOSEPHSON, THE POLITICOS 526 (1938).

[28] J. LANDIS, THE ADMINISTRATIVE PROCESS 15 (1938). In later years Dean Landis himself was greatly disillusioned. *See* J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 1-35 (1960).

problem have combined to feed the commissions a starvation diet of necessary factual material. When the facts are available, they are too often provided by industry loyalists. While there recently have been a few encouraging signs, citizen participation in the agency decisionmaking process remains virtually nonexistent.[29]

This lack of citizen participation is a product of many factors: (1) narrow standing rules; (2) the failure of the commissions to encourage popular participation; (3) the public's ignorance about commission activities; (4) the complexity of our rules; and (5) the need for more effective public interest representation. To better appreciate their cumulative effect, let us consider their incidence at the FCC. The pattern undoubtedly repeats itself at other agencies.

Narrow Standing. In only a few cases have interested parties with no direct financial stake in the outcome of a decision effectively participated in proceedings before the Commission. By far the most important of these involved a petition filed with the FCC more than seven years ago opposing the renewal of the license of television station WLBT in Jackson, Mississippi.[30]

The petitioner, the United Church of Christ, alleged that WLBT had systematically promoted segregationist views, refused to present opposing views, and excluded Negroes from access to its facilities.[31] Despite the FCC's vaunted encouragement to citizen participants in its proceedings, the Commission first ruled that the petitioner did not even have the necessary "standing" to appear before the Commission and present its arguments.[32]

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the Commission.[33] The holding constitutes a strong indictment of the then existing agency philosophy.

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29 SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 91ST CONG., 1ST SESS., RESPONSES TO QUESTIONNAIRE ON CITIZEN INVOLVEMENT AND RESPONSIVE DECISION-MAKING 19 (Comm. Print 1969). "In most cases, the principal input is by parties having a financial interest in the outcome of the proceeding and resources sufficient to retain competent professional assistance, and by the staff of the Commission as representatives of the public." *Id.* (Answer of Rosel H. Hyde, Chairman, FCC).

30 Lamar Life Broadcasting Co., 38 F.C.C. 1143, 5 P & F RADIO REG. 2D 205 (1965).

31 *Id.* at 1144, 1148-53, 5 P & F RADIO REG. 2D at 208, 213-18.

32 *Id.* at 1149 & n.11, 5 P & F RADIO REG. 2D at 214 & n.11. Notwithstanding this holding, the Commission proceeded to "consider the contentions advanced." *Id.* at 1149, 5 P & F RADIO REG. 2D at 214.

33 Office of Communication of United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 337-40, 359 F.2d 994, 1003-06 (1966).

> After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.
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> . . . .
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> We cannot believe that the Congressional mandate of public participation which the Commission says it seeks to fulfill was meant to be limited to writing letters to the Commission, to inspection of records, to the Commission's grace in considering listener claims, or to mere non-participating appearance at hearings. . . .
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> Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the legitimate interests of listeners can be made a part of the record which the Commission evaluates.[34]

In the four years since the *WLBT* decision, the Commission has done little to encourage actual citizen participation in its proceedings other than to say that it "encourages" such participation. Although the final resolution of the merits of the *WLBT* case is still before the Commission, its early contribution to the law of "standing" paved the way for further citizen participation in Commission proceedings.[35]

The essential point, however, is that the FCC's initial, instinctive reaction was to oppose, not encourage, greater citizen participation in its proceedings, and that it took a forceful judicial opinion to preserve this valuable right. This bias against citizen-initiated criticisms of the broadcasting industry has remained within the structure, procedures, and predisposition of the Commission.

Since the *WLBT* decision, the doors have been opened to greater citizen participation in the affairs of the broadcast media, but only slightly. In Media, Pennsylvania, for example, 19 local civic and religious organizations protested radio station WXUR's alleged presentation of masses of right-wing political programming. They obtained a hearing in their hometown, conducted by the FCC.[36] An Ohio Retail Clerks Union unsuccessfully petitioned the FCC to deny the license of a radio station which had refused to broadcast advertisements financed by the

[34] *Id.* at 337-39, 359 F.2d at 1003-05. In a later appeal from the Commission's decision on remand the court of appeals again found the Commission's handling of the matter grossly inadequate. Circuit Judge Burger wrote: "We did not intend that intervenors representing a public interest be treated as interlopers." Office of Communication of United Church of Christ v. FCC, 138 U.S. App. D.C. 112, 115, 425 F.2d 543, 546 (1969).

[35] *See* Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1253-55 (1966).

[36] Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18 (1970).

union advocating the boycott of a local department store, while at the same time accepting commercials urging listeners to shop at that same store.[37] In Los Angeles, a group of businessmen have challenged the renewal of the license for television station KHJ alleging that it provides inadequate local service.[38] In Chicago, a group of good music enthusiasts, The Citizens Committee to Save WFMT-FM, obtained a hearing in an attempt to prevent the Chicago Tribune from acquiring the most popular classical music station in the area.[39] Significantly, this was another case in which the FCC denied a hearing to petitioners, only to be reversed by the United States Court of Appeals for the District of Columbia Circuit.[40] Two local citizens in Salt Lake City petitioned the Commission to deny the license renewal of television station KSL, owned and operated by the Mormon Church.[41] Again, the petition was denied without a hearing, and the "standing" of petitioners to appear before this agency was questioned.[42] Denial was in part based on petitioners' failure to comply with the FCC's rule requiring typewritten, double-spaced pleadings.[43]

That citizen access through less rigid standing requirements has an impact upon regulatory processes is demonstrated in the recent *WHDH* case. A group of Boston businessmen and professors filed a competing application for the three-year privilege to operate a television station

[37] WFMJ Broadcasting Co., 14 F.C.C.2d 423, 426, 13 P & F RADIO REG. 2D 1226, 1228 (1968) (Johnson, concurring in part and dissenting in part). The Commission was subsequently reversed. Retail Store Employees Union v. FCC, 435 F.2d 248 (D.C. Cir. 1970).

[38] *See* RKO General, Inc., 5 F.C.C.2d 517, 517-20, 8 P & F RADIO REG. 2D 957, 959-62 (1966).

[39] Gale Broadcasting Co., 21 F.C.C.2d 406, 15 P & F RADIO REG. 2D 337, 341 (1969).

[40] Joseph v. FCC, 131 U.S. App. D.C. 207, 404 F.2d 207 (1968). The assignment had been approved without a hearing or opinion and after receipt of petitioner's motion for a hearing, but before that motion had been brought to the Commission's attention. *Id.* at 208-09, 404 F.2d at 208-09. The court treated petitioner's motion, considered after the approval as a motion to reconsider. *Id.* at 210, 404 F.2d at 210. The court reversed for a fuller consideration of all public interest issues. *Id.* at 211-12, 404 F.2d at 211-12.

[41] KSL, Inc., 16 F.C.C.2d. 340, 15 P & F RADIO REG. 2D 458 (1969); *see* Hale v. FCC, 138 U.S. App. D.C. 125, 425 F.2d 556 (D.C. Cir. 1970).

[42] 16 F.C.C.2d at 344, 15 P & F RADIO REG. 2D at 465. The Commission failed to reach the issue of standing because of its holding on the merits. *Id.* The petition for reconsideration was dismissed: "[W]hile complaints from the listening public are always welcome and will receive careful consideration, fairness and the proper discharge of our responsibilities require that action on those complaints meet the standard laid down by Congress in the Communications Act—that there be substantial and material questions of fact or issues going to the public interest, before we designate a licensee's application for hearing." *Id.* at 345, 15 P & F RADIO REG. 2D at 464. In dissent, I attempted to show the magnitude of the public interest questions raised and the necessity for dispelling all doubts about petitioners standing to raise them. *Id.* at 346-50, 15 P & F RADIO REG. 2D at 465-69.

[43] *See id.*, at 350 & n.2, 15 P & F RADIO REG. 2D at 469 & n.2 (Johnson, dissenting).

on Channel Five.[44] A few months later, the Commission ruled in their favor.[45] For the first time in its history, the Commission took seriously the documented claims of local citizens maintaining that they could better operate a television station in the "public interest." [46]

This decision, and the broadcasting industry's subsequent expressions of outrage, caused the introduction of legislation in Congress designed to establish a presumption that a licensee is operating in the public interest unless proven otherwise.[47] If this bill had become law, the FCC would have been barred from ever considering competing applications for existing television stations until it first had determined that the existing licensee was unfit. One writer drew an analogy between the proposed legislation and an election law providing that "no one could run for public office until the incumbent had been impeached." [48] The legislation eventually was headed off by the Commission, which issued a policy statement guaranteeing to the broadcasters automatic renewal unless competing applicants could demonstrate that the licensee failed to render "substantial" service, a far higher standard of proof than the 1934 Communications Act contemplated.

Arrayed against these few examples of citizen involvement are the vast number of Commission acts each year which merely rubber-stamp the requests of broadcasters. Approximately 7,600 broadcast station licenses in the United States are renewed every three years[49] and in virtually every case there is no effective citizen participation. The problem is not unique to license renewals. The Commission has jurisdiction over the nation's entire common carrier services, dominated by American Telephone and Telegraph Company and the Bell System; yet citizens' groups rarely, if ever, participate in the Commission's almost daily decisions regarding the telephone company and affecting millions of phone users.[50] The list goes on—CATV, satellites, land mobile radio

[44] WHDH, Inc., 16 F.C.C.2d 1, 15 P & F RADIO REG. 2D 411 (1969). *See generally* Jaffe, WHDH: *The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969).

[45] 16 F.C.C.2d at 4, 19, 15 P & F RADIO REG. 2D at 418, 434.

[46] *Id.* at 8-20, 15 P & F RADIO REG. 2D at 423-34.

[47] *See Hearings on S. 2004 Before the Communications Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969). For a debate on the merits of the bill, see Jaffe, *We Need the Pastore Bill*, NEW REPUBLIC, Dec. 6, 1969, at 14; Johnson, *No, We Don't*, NEW REPUBLIC, Dec. 6, 1969, at 16.

[48] Lydon, *F.C.C. License Renewals: A Policy Emerges*, N.Y. Times, April 27, 1969, at 72, col. 3.

[49] 40 TELEVISION DIGEST, INC., TELEVISION FACTBOOK 59a (71). Of the 7,622 radio and television stations listed as on the air in 1969, there were 677 commercial television, 185 educational television, 4,292 AM radio, and 2,468 FM radio stations. *Id.*

[50] *Cf.* SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, *supra* note 29, at 19.

services, educational television, and so forth—and yet there is effective citizen participation in only the barest fraction of these proceedings. Predictably, this one-sidedness of representation seriously inhibits the Commission's ability to adequately regulate the communications industries. Beset by a lack of funds, a too-often lethargic Commission majority, and under the influence of aggressive and highly skilled commercial advocacy, the FCC staff often is unable to carry out its mandate to protect the "public interest."

Failure to Encourage. In addition to a narrow view of standing, the Commission has done little to encourage intelligent citizen participation. In September 1970, the FCC refused to approve an agreement that would have allowed a television station, KTAL-TV in Texarkana, Texas, to reimburse the United Church of Christ for expenses the church had incurred in helping Negroes oppose the station's license renewal.[51] The Church had dropped the costly fight after the station had promised to improve black hiring and programming.[52] If the Commission had chosen instead to approve the $15,000 reimbursement, it could have set a powerful precedent, encouraging local public-interest groups to fight as private attorneys general in forcing stations to do what the FCC is unable or unwilling to do: upgrade their performance.

Public Ignorance of Agency Action. The agency's failure to publicize sufficiently its proceedings and generally to inform the public of its actions and of citizen rights in those actions further contributes to the problem. In "adjudicative" cases, all known parties in interest are notified,[53] but this does not include representatives of the public at large. In "rulemaking" proceedings, the public rarely learns of the proposals. Virtually all the Commission does to notify the general public of its regulatory powers is to distribute "Public Notices" of its decisions and proposed rulemaking proceedings, often framed in impenetrable legal jargon. The Commission then relies upon communication lawyers, the trade press, and the *Federal Register* to bring the information to the public's attention. Thus, many groups substantially affected by the Commission's decisions never learn of its proposals, nor of the fact that they might participate.

Certainly the Commission owes the public more than a twice-daily pile of public notices stacked on a table in an obscure Washington office building. It could at least require licensees to broadcast regular spot

[51] KCMC, Inc., 25 F.C.C.2d 603, 605, 20 P & F RADIO REG. 2D 267, 269 (1970).

[52] *See* KCMC, Inc., 19 F.C.C.2d 109, 16 P & F RADIO REG. 2D 1967 (1969).

[53] *See* Administrative Procedure Act § 5(a), 5 U.S.C. § 1004(a) (1964).

announcements in prime time alerting listeners and viewers that its license is up for renewal and how citizens can effectively exercise their rights in the renewal process.[54]

Complex Rules and Ineffective Counsel. Competent representation is vital to a person seeking to maintain a free flow of consumer communication, perhaps equally as vital as to the defendant in most criminal cases. This is in large part due to the complex rules and procedures which lawyers have evolved and thereby profited from.

The fast growing body of communications law is quickly achieving an intricacy comparable to that involved in legal specialties like criminal procedure and tax law. Citizens' groups have difficulty even obtaining the "standing" to appear before the Commission and to participate in its decisionmaking process, and when they do appear they often find it impossible to obtain counsel fully conversant with the technicalities of communications law. The Citizens Committee to Save WFMT-FM, for example, could not produce an attorney on the first morning of their Chicago hearing.[55] Despite a motion for postponement during which supplemental material could have been submitted, or, in the alternative, to keep the record open for an additional 30 days, the hearing examiner ordered that the hearing proceed.[56] One of the citizen members of the committee had to handle himself as best he could, without any preparation or legal experience.[57]

Inadequate Investigatory Facilities. The lack of effective citizen participation is only part of the reason for the agency's failure to handle problems and complaints in a way that produces results. Inside the Commission, the few available investigative personnel are limited

[54] This idea has been most actively advanced by John Banzhaf and some of his students at George Washington University Law School. *On-Air Lessons in Broadcast Reform?*, BROADCASTING, Jan. 11, 1971, at 23.

[55] The details of this incident are to be found in the public papers of the Federal Communications Commission, Washington, D.C. *See* Applicant WGN Continental FM Company's Proposed Findings of Fact, at 15, Assignment of WFMT-FM, Chicago Ill., FCC Docket No. 18,417, vol. 3 (1969). For earlier background on the development of the "Citizens Committee to Save WFMT-FM," see Joseph v. FCC, 131 U.S. App. D.C. 207, 212, 404 F.2d 207, 212 (1968).

[56] WGN's Proposed Findings of Fact, *supra* note 55, at 16.

[57] *Id.* at 15. Eventually, however, the Chicago citizens' committee did triumph. The Citizens Committee to Save WFMT subsequently obtained legal counsel, who successfully defended listener rights in the matter. On Oct. 9, 1969, officials of the Chicago Tribune Co. announced that WFMT would be donated to a Chicago charity, Chicago Educational Television Association, in order to promote educational broadcasting in the public interest. *Application for Assignment of FM Station WFMT*, 21 F.C.C.2d 401, 402; 18 P & F RADIO REG. 2D 434, 435 (1970).

by inadequate funding and a failure of direction from the top levels in the Commission.

The steadily increasing number of broadcasting stations, the expansion of the areas of the Commission's regulatory responsibilities, and the public's growing awareness of its right to complain to the Commission about broadcaster performance all have combined to impose a heavy and increasing workload on all the operating bureaus of the Commission. Thus, complaints are often ignored or given unhelpful and discouraging boilerplate replies, and the number of actions decided in favor of the complainant are noticeably few.

The problem is especially acute at the Complaints and Compliance Division of the Broadcast Bureau, whose present workload is approximately six times greater than that handled a few years ago by a division with a somewhat larger staff than at present.[58] Under these conditions, the Commission has been able to investigate only 40 to 50 stations annually out of the 7,500 in operation.[59] Of the investigations actually carried out, many have been so limited in time and scope, because of lack of personnel and travel funds, that information sufficient to decide whether to designate a licensee for a revocation or renewal hearing often could not be developed.[60]

The 1967 cigarette advertising rule further demonstrates inadequacy of investigatory facilities. In response to a rather extraordinary citizen-complaint, the Commission ruled that stations presenting cigarette advertising also had to present material on the hazards of smoking.[61] Enforcement of that ruling has depended not on the Commission but almost entirely upon the watchfulness, the complaints, and the continuing work of Professor John Banzhaf, the sole original petitioner. Fortunately, Professor Banzhaf is no ordinary citizen. He is a highly qualified lawyer, well equipped to defend his rights and the rights of other citizens.[62]

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58 FEDERAL COMMUNICATIONS COMM'N, BUDGET ESTIMATES, FISCAL YEAR 1972, at 21 (Jan. 1971).

59 *Id.*

60 *Id.*

61 Cigarette Advertising, 9 F.C.C.2d 921, 949, 11 P & F RADIO REG. 2D 1901, 1937 (1967). The rule was adopted at the request of Action on Smoking and Health (ASH), which is directed by Professor Banzhaf of George Washington University Law School. *Id.* at 922, 11 P & F RADIO REG. 2D at 1905.

62 John Banzhaf, like Ralph Nader, has done such an impressive job on behalf of the public interest that even the establishment idolizes his rigorous individualism. Page, *The Law Professor Behind ASH, SOUP, PUMP, and CRASH*, N.Y. Times, Aug. 23, 1970, § 6 (Magazine), at 32, 40; Roper, *The Man Behind the Ban on Cigarette Commercials*, READER'S DIGEST, Mar. 1971, at 213.

THE SUBGOVERNMENT PHENOMENON

Policymaking by agencies is dominated by the so-called subgovernment, a coalescence of lobbyists, specialty lawyers, trade associations, trade press, congressional subcommittee staff-members, and commission personnel who cluster around each of the regulated industries. Political scientists have focused scant attention on this phenomenon and its ability to conduct the public's business, largely beyond the public's view. Yet, it has become a major fixture of our commission form of decision-making.

The problem likely does not involve sinister collaboration to undermine the effectiveness of regulatory control, but is instead much more subtle. As James Landis put it in his report to President Kennedy: "[I]t is the daily machine-gun-like impact on both agency and its staff of industry representatives that makes for industry orientation on the part of many honest and capable agency members, as well as agency staffs." [63]

The Federal Communications Commission has jurisdiction over the nation's entire radio and television system. Its jurisdiction also covers interstate communication common carrier services, communication satellites, land mobile radio services, educational broadcasting, and numerous other areas.[64] Each of these immensely powerful enterprises has millions of dollars to spend in preserving and extending its corporate power, enough to purchase the best Wall Street or Washington lawyers, skilled in the art of persuasion and familiar with the intricacies of administrative practice, to present their briefs before the Commission. This money can also buy elaborate public relations programs—brochures, pamphlets, slick magazines, and advertisements in newspapers and on television—to promote the basic idea that corporations are innovative, prosperous, interested in the well-being of the American citizen, and, above all, benevolent.

Each day, the Commission receives pounds of briefs, pleadings, letters, and petitions from broadcasting and other regulated industries. Each day lobbyists, broadcasters, industry representatives and attorneys talk informally with staff members and commissioners about the "problems" of their industry. And, each day, the Commission churns out innumerable memoranda, orders, decisions, letters and rulemaking proposals which in effect preserve the status quo and the profitable stability of the industries involved.

This subgovernment grows around any specialized private interest-government relationship which exists over a long period of time. It is

63 J. LANDIS, REPORT, *supra* note 28, at 71.

64 Communications Act of 1934, § 2(a), 47 U.S.C. § 152(a) (1964).

self-perpetuating and endures unaffected by tides of public opinion and efforts for reform. In the case of broadcasting, it includes the networks and multiple station owners, the Federal Communications Bar Association, *Broadcasting* magazine, the National Association of Broadcasters, the communication law firms, and the industry-hired public relations and management consultant firms. It also includes the permanent government staff—regulatory, executive and congressional—which is concerned with day-to-day activities of the broadcasting industry. People in this subgovernment typically spend their lives moving from one organization to another within it. Those who pursue the course of protecting the public interest are rarely admitted.

For those who attempt to challenge the subgovernment, there is little toleration. There is an iron fist reaction every time the public shows even the most pathetic willingness to do battle. General Motors' alleged harassment of Ralph Nader and their incursions into his personal life are classic examples.[65] Indeed, most public interest groups have been harassed in one way or another. Consider, for example, the recent IRS attempt to challenge the activities of these organizations by threatening the loss of valuable tax advantages.[66]

Lobbyists and the trade press expend great sums of money for lobbying and entertaining in Washington and devote substantial amounts of time to persuading congressmen, commissioners, and staff members of the rightness of their cause. *Broadcasting* editorialized that with ever-increasing profits broadcasters "might even be able to afford the monumental efforts needed to fend off the onslaughts mounted against them in Congress and at the FCC and other governmental levels." [67] Yet, in the face of all this, the American public remains without representation before the Commission, without information necessary to alert it to its rights, without knowledge as to how to proceed, without awareness, indeed, that it has rights. In sum, the public is silent, unheard, unseen.

Some hold out the hope that the staff of the Commission will represent these silent citizens. This is simply not realistic. Although much of the staff is loyal, dedicated, and experienced, the adversary process which

[65] General Motors has paid Mr. Nader $425,000 in settlement of his invasion-of-privacy suit that followed a company investigation of his private life. Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970); Greer, *Nader Gets $425,000 In Suit Against GM*, Washington Post, Aug. 14, 1970, § A, at 1, col. 1. Whereupon Mr. Nader invested the proceeds in more consumer crusading. *Empire of the Consumer Crusader Blossoms, Bringing [Him] New Challenges and Problems*, Wall Street Journal, Nov. 19, 1970, at 40, col. 1.

[66] Mintz, *IRS Holds Up on Public Interest Cases*, Washington Post, Oct. 16, 1970, § A, at 3, col. 1. *See also* 116 CONG. REC. 10126 (daily ed. Oct. 14, 1970) (remarks of Rep. Dingell).

[67] *Bright Side*, BROADCASTING, June 2, 1969, at 88.

operates in our courts simply does not meaningfully exist in many FCC proceedings, and the staff is deluged with only one point of view.

Reinforcing the subgovernmental relationship is the so-called "deferred bribe." [68] Year after year, regulatory commissioners and staff leave their posts and go to work for the very industries they were supposed to be regulating. The agency is a well-known training ground for industry personnel, a graduate school for the regulatory subgovernment. Many young lawyers, for example, plan to work for the FCC for a few years and then move to higher paying jobs in the communications bar of Washington. They are naturally careful not to alienate the broadcasters during their stay at the Commission, lest they jeopardize their chances of future employment. Once they are firmly ensconced in private practice, they keep in touch with friends at the Commission and, through them, with Commission policies, trends, and views. In part, this phenomenon is a natural result of the communications industries' ability to offer higher salaries to really outstanding staff members. But it is at least equally the result of rather depressing working conditions for young staff members, whose creative efforts are often squelched by entrenched section heads and bureau chiefs and by the agency's general lack of the will to play a positive regulatory role. At the same time, many of the staff, before coming to the Commission, worked for the very communications industries they now regulate.

It is thus typical of subgovernments that they tend to be populated by friends, former colleagues, and relatives, many of whom have worked for two or more of the components of the subgovernment. This incestuous relationship cannot help but work against effective representation of the public by those subgovernment members who happen at any given time to be working for the FCC.

THE FAILURE TO PLAN POLICY

Decisions at the independent commissions tend to be made *ad hoc* rather than as an implementation of a conscious, well-developed policy. This results from a lack of strong central planning bodies and from the staff's preoccupation with operational responsibilities of a day-to-day nature. At the FCC, for example, there is little inclination to see policy planning as the major, or even an important, agency function. Consequently, it is the last activity initiated and the first dropped. It is not that the FCC does the policy planning job poorly; it does not do it at all. The problem is an especially serious one at the FCC since policy planning is, in a very real sense, its *raison d'etre*.

[68] The origin of the phrase is unknown. Ralph Nader is often credited with coining it.

From the Hoover Task Force of 1949[69] to the present, reports, professors, congressmen, commissioners, and judges have noted this problem with dismay.[70] Dean Landis characterized the FCC as a "somewhat extra-ordinary spectacle. . . . [T]he Commission has drifted, vacillated and stalled in almost every major area. It seems incapable of policy planning, of disposing within a reasonable period of time the business before it, of fashioning procedures that are effective to deal with its problems."[71] Clay T. Whitehead, director of the new Office of Telecommunications Policy, echoes the same sharp criticism of the Commission.[72] He finds the agency a "vague" arbiter of public communications and has called for a re-examination of national policy toward communications and commercial broadcasting.[73] In fact, the rapid growth of the OTP's jurisdiction in part has been due to the FCC's failure to fulfill its policymaking function adequately.

At the root of the problem is a failure in communication between the scientists and engineers, whose work and thoughts produce the available technology, and the lawyers, economists, and government officials who make decisions as to the use of that technology.[74] If decisions are made without understanding all the ramifications of a new technology, they are likely to produce very harmful, and unforeseen, effects. One example is the dislocation in employment resulting from greater automation. Another is the development of airplanes that fly faster and carry more passengers, but which also produce sonic booms, congested airports, and hazards to human life. Technological advances have permitted the production of processed food with less nutritional value.

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[69] The Hoover Task Force of 1949 concluded: "[T]he Commission has been found to have failed both to define its primary objectives and to make many policy determinations required for efficient and expeditious administration." COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, COMM. ON INDEPENDENT REGULATORY COMM'NS, TASK FORCE REPORT ON REGULATORY COMM'NS 95 (1949).

[70] Judge Henry J. Friendly of the Second Circuit, for example, wrote in 1962, discussing the Commission's license award hearings: "Such inconsistency is intolerable. The Commission must develop enough courage to penetrate the fog it has helped create . . . . What is essential is that the Commission do *something* so that a policy will emerge." H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 67, 68 (1962). Former FCC Chairman Rosel H. Hyde also sees a need to do more "forward planning." *Hearings on H.R. 9960 before a Subcomm. of the House Comm. on Apropriations*, 90th Cong., 1st Sess., pt. 1, at 1182 (1967). While he believes the Commission has "done some foresighted things," he warns that these measures have "been far less than I think would be required . . . to anticipate with reasonable provision for the development of communications techniques." *Id.* at 1184.

[71] J. LANDIS, REPORT, *supra* note 28, at 53.

[72] Ferretti, *White House Aide Criticizes F.C.C.*, N.Y. Times, Dec. 17, 1970, at 95, col. 1.

[73] *Id.*

[74] *See generally* C.P. SNOW, TWO CULTURES (1959).

Perhaps the classic example is provided by the automobile, both a remarkable contribution to personalized, rapid transportation and a cause of 50,000 deaths a year from accidents, about 80 percent of all our air pollution, a nation paved with billboards, and the dehumanizing commuters' crush.[75]

Decisions of this magnitude, with all their implications, require the best minds and the most advanced techniques of decisionmaking. But very seldom do the decisionmakers have sufficient data to analyze intelligently a difficult problem. Obsolete practices and a failure to employ the most advanced techniques and technologies of managerial decisionmaking are coupled with the usual bureaucratic reluctance to experiment and innovate, and the scarcity of intelligent staff capable of performing the hard analysis that decisionmaking requires. Thus, at the FCC no top policymaker regularly uses computers as an aid to decisionmaking. Until recently, no office in the Commission was dedicated to policy planning and no groups perform full-time economic analysis, systems analysis, or program planning.[76] Thus, out of practice and necessity, as well as political expediency, a limited staff turns to special interest groups willing to provide information and opinion. But for the presence of such groups, the bureaucracy might not be able to function at all. Such routine reliance hardly can be expected to produce regulation consistently in the public interest.

Nowhere is the Commission's inability to adequately evaluate new technology better demonstrated than in our inquiry on computers and communications.[77] Despite the significance of the problem and the complexity of the issues, the FCC does not have a central policy planning

[75] *See generally* H. LEAVITT, SUPERHIGHWAY-SUPERHOAX (1970). The author analyzes the distortion of our national transportation priorities and what the American automobile is doing to us as human beings. She details the quiet scandal in the nation's interstate highway system, a scandal that has cost the nation dearly in lives, air pollution, and lagging development of alternative modes of transportation.

[76] The Commission has now made a modest start toward establishing a policy planning section. The first Planning Officer joined the Commission on March 23, 1970. FCC Public Notice 45,931 (March 20, 1970). The staff, which is assigned to the Office of the Chairman, now has four professionals and two secretaries.

[77] In late 1966 the FCC launched a formal, public inquiry into computers and communications exploring such issues as rates and available facilities for data transmission. The agency is given some credit—and properly so—for taking the rather unusual step of initiating an inquiry prior to a formal request by outside parties. Notice of Inquiry, Interdependence of Computer and Communication Services, Docket No. 16,979, 7 F.C.C.2d 11 (1966); Supplemental Notice of Inquiry, Interdependence of Computer and Communication Services, 7 F.C.C.2d 19, 9 P & F RADIO REG. 2D 1513 (1967); Report and Further Notice of Inquiry, Computer Use of Communications Facilities, 17 F.C.C.2d 587, 16 P & F RADIO REG. 2D 1505 (1969); Tentative Decision and Notice of Proposed Rule Making, FCC No. 70-338, 18 P & F RADIO REG. 2D 1713, 1714 (Apr. 3, 1970). *See also* Irwin, *The Computer Utility*, 76 YALE L.J. 1299 (1967).

staff solely concerned with the computer problem. Without this kind of staffing, we cannot reasonably expect the development and presentation of alternative policy approaches. Beyond this, our inquiry lacks a source of independent information with which to deal intelligently with the problem. We are forced to rely principally on information provided by special interest groups. What we need is an independent research organization that could provide information-gathering services, research, analysis, and even advocacy of public interest positions.

Significant problems also lie in the way we function as Commissioners. Typically, on a matter as complex as the computer inquiry, Commissioners have almost no independent knowledge or expertise. Since there is no separate policy planning function, the Commission must rely on a single bureau's presentation. More often than not, that bureau, without instructions, works over the policy questions, the alternatives, and the procedures, presenting a finished package to the Commission for adoption or rejection. The Commissioners have only one developed option from which to choose, and they do not require alternative presentations. Nor have they staff resources to effectively challenge a bureau presentation, or to present alternatives. The problem is compounded by the fact that in all its endeavors the Commission is almost wholly dependent upon outside information. Independent inquiry is a function which is only rarely and haphazardly pursued. Critical evaluation of outside information is a rarity. When the outside information conflicts, the Commission finds itself in a quandry, not knowing how to decide or how to go about deciding.

This failing is not the FCC's alone. Although my experience has been limited primarily to the shipping, transportation, and communications industries, I believe that government decisions affecting most other industries have similar deficiencies. The problem is found throughout public life. As Charles Schultze, former Director of the Bureau of the Budget, has said:

> The most frustrating aspect of public life is not the inability to convince others of the merits of a cherished project or policy. Rather, it is the endless hours spent on policy discussions in which the irrelevant issues have not been separated from the relevant, in which ascertainable facts and relationships have not been investigated but are the subject of heated debate, in which consideration of alternatives is impossible because only one proposal has been developed, and above all, discussions in which nobility of aim is presumed to determine effectiveness of program.[78]

[78] C. SCHULTZE, THE POLITICS AND ECONOMICS OF PUBLIC SPENDING 75 (1968).

This type of government serves no one's interest, public or private. The heavy hand of stagnant and senseless regulation affects the business community as much as the general public. The interference-ridden, nighttime AM radio band, in which many broadcasters still seek to earn a respectable livelihood, stands as a blaring memorial to the thousands of FCC decisions which have brought us to our present chaos. The UHF system of the 1970's could have been ours in the 1950's, and the lives of 200 million Americans and the profit and loss statements of many businessmen are poorer as a result. There is no reason to believe that our *ad hoc* approach to the cable television industry will produce any wiser results than it did with UHF. Until our Commission generates the will to formulate broad, effective policy, everyone's interests will suffer.

REGULATORY DELAY

Further contributing to the inadequacies of our independent regulatory system and inhibiting reform is a well-developed technique that might be called "regulatory delay." [79] Reform movements generally result from crises that command public attention and concern. For those who wish to stem their tide, the best antedote is time. The pattern has become almost classic. Something happens which requires government action, and the matter comes to the attention of the public. A proceeding is undertaken or an agency created to deal with the question. The public believes something will be done, but accepts the fact that it will take time. Then pressure is applied to those who have been handed the job of investigation and reform. Corporate interests that might be adversely affected move to delay, to water down, to remove the overly zealous, and then, finally, to participate in the ultimate decisionmaking. They hope the public will forget its original outrage until the process is next repeated. They are generally correct.

The National Institutes of Mental Health panel appointed to evaluate the impact of television on violence in our society provides an example.[80] Here was a crisis, with public awareness and concern, and here was an expert group to examine the problem. The panel hoped to have an interim report by October 1969; none was filed. Forty professionals were proposed for the panel, and the broadcast industry was allowed to veto whomever was unacceptable; seven were excluded, in-

[79] Regulatory delay is a general characteristic of most administrative agencies. Dean Landis wrote in his 1960 report: "Inordinate delay characterizes the disposition of adjudicatory proceedings before substantially all our regulatory agencies." J. LANDIS, REPORT, *supra* note 28, at 5.

[80] Shayon, *Choosing the Investigators*, SATURDAY REVIEW, Sept. 5, 1970, at 34.

cluding some of those most highly qualified.[81] Of the 12 who were appointed, five either worked for, or were affiliated with, the networks.[82] The coordinator of research has left the project, in part because of the refusal by NIMH to take the project seriously or to be courageous about its task.[83] Ironically, a significant part of the research is being done by those eliminated from consideration for membership on the panel, a tribute no doubt to the efforts of the former coordinator of research to secure the best talent he could.[84] There is now a question of whether that research will be used.

Delay also inhibits reform at the FCC. In 1965, the Commission, concerned over charges of predatory pricing by the Bell System and conscious of the fact that no formal investigation of the company had been undertaken in years, began a study.[85] As a result of the inquiry, an overall rate of return was set and a rate reduction ordered in 1967.[86] Two years later, however, Bell succeeded in persuading the Commission—without a hearing—to change the rate of return to what Bell had wanted in 1967.[87]

There were four areas of inquiry in addition to rate of return. On the question of the appropriateness of the Bell estimate of the rate base, we accepted Bell's figures, promising to get to that question later. On the appropriateness of its costs, including the company's failure to use accelerated depreciation and its use of institutional advertising at ratepayer expense, we again deferred judgment.[88] On the question of appropriate regulatory guidelines to prevent predatory pricing by Bell, we simply decided that we could not decide, and started a new proceeding.[89] And as for the problem of vertical integration—the relationship between Bell's wholly-owned supplier, Western Electric, and the rest of the Bell System—there are now no scheduled proceedings to deal with the question at all.[90] Such is the typical fate of consumer representation and reform.

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81 *Id.*

82 *Id.*

83 *Id.*

84 *See id.*

85 American Tel. & Tel. Co., 2 F.C.C.2d 871 (1965).

86 American Tel. & Tel. Co., 9 F.C.C.2d 30 (1967).

87 *See* Reduction for Interstate Long-Distance Calls, 21 F.C.C.2d 654, 656 (1969) (Johnson, dissenting); American Tel. & Tel. Co., 20 F.C.C.2d 886, 893 (1969) (Johnson, dissenting).

88 *See* American Tel. & Tel. Co., 2 F.C.C.2d 871 (1965); American Tel. & Tel. Co., 9 F.C.C.2d 30 (1967).

89 American Tel. & Tel. Co. (Phase IB), 18 F.C.C.2d 761, 763 (1969).

90 *Id.*

PROPOSALS FOR REFORM

With government agencies performing this way it is little wonder the people are beginning to demand new consumer protectors, private and governmental, to restrain the agency-corporate interest alliance. Over the last half year, several significant reform proposals have been put forward. Two are especially worthy of attention.

Philip Elman, the widely respected former Commissioner of the Federal Trade Commission, finds the agencies a confusing mixture of the investigative, judicial, and administrative processes.[91] Their independence from direct presidential control has worked paradoxically, Commissioner Elman believes, to make the agencies responsive to the narrow interests of the industries they regulate rather than to the broad public interest.[92]

To make the agencies function in the public interest, Mr. Elman urges more than a modest reorganization. He has "come to the view that the chronic unresponsiveness and basic deficiencies in agency performance are largely rooted in its organic structure and will not be cured by minor or transient personnel or procedural improvements . . . . It is time for radical structural reform." [93] Commissioner Elman would replace the cumbersome commission structure with a single administrative head and delegate all judicial powers to an administrative court.[94] Mr. Elman, however, warns that such reforms will fail "unless radical changes in the climate of our government and the political process" [95] are brought about, noting the need to "institutionalize the means whereby the public may be aware of, and participate in, political and governmental processes that effect the quality of our lives." [96]

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91 The Regulatory Process: A Personal View, Address by Commissioner Philip Elman, Federal Trade Commission, Before the American Bar Association, St. Louis, Mo., Aug. 11, 1970, *excerpted in* Wall Street Journal, Aug. 12, 1970, at 12, col. 4; *see* Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777 (1971).

92 Elman Address, *supra* note 91, at 12, col. 5.

93 *Id.* Mr. Elman believes that, broadly speaking, "[g]overnment regulation is necessary and justified only when it serves the public interest, not the special interests of private groups or industries." *Id.* at 12, col. 4. While he thinks that short-term government assistance to infant industries may be appropriate, "we should not go on sheltering them forever in the guise of protective regulation." *Id.*

His message is echoed in a recent opinion of the U.S. Court of Appeals for the District of Columbia Circuit: "Ignoring the general public's interest in order to better serve the carriers is not the proper response to the difficulties supposedly created by an outdated or unwieldy statutory procedure. After all, there is more to rate-making than providing carriers with sufficient revenue to meet their obligations to their creditors and to their stockholders." Moss v. CAB, — U.S. App. D.C. — 430 F.2d 891, 901 (1970).

94 Elman address, *supra* note 91, at 12, col. 6.

95 *Id.*

96 *Id.*

Some of Commissioner Elman's suggestions are in accord with a report by the President's Advisory Council on Executive Organization, headed by Litton Industries' President Roy L. Ash.[97] Before the Ash report's release, *Business Week* called it a "dramatic set of proposals" for reorganization which suggest that in most cases "the commission form of government should be done away with altogether." [98] Multiheaded commissions, the Ash report concluded, are slow to agree on decisions, prone to bog down in their own judicial procedures, and glacial in adapting to change. A major Ash proposal is to merge the ICC, CAB, and Maritime Commission into a single transportation regulatory agency headed by a single executive.[99] Except for the FCC, the other commissions would be restyled similarly.[100] Following the Elman argument, the Ash Council would transfer the agencies' judicial functions to a new administrative court.[101]

Consumers must be wary. Under twin veils of "revitalization" and "reformation," the Ash Council appears to be quietly burying what little hope of vigilance remains for the lowly consumer in the regulatory process. Perhaps this judgment is too hasty. Nevertheless, from what little has surfaced, the Ash proposals appear noticeably devoid of any strong sentiments toward the current plight of the American consumer, no well known consumer advocates having participated on the panel.[102] As one columnist pointed out, "The council is headed by Roy Ash, president of Litton Industries—one of the corporations, incidentally, that

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97 *See* PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK, REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971).

98 *Nixon Sends Up the Ash Balloon,* BUSINESS WEEK, Aug. 29, 1970, at 24.

99 PRESIDENT'S ADVISORY COUNCIL, *supra* note 97, at 61-85.

100 *Id.* at 5-6, 25. The FCC would be left with at least five Commissioners, the feeling apparently being that it is not healthy for a democratic society to concentrate communications power in the hands of a sole administrator. Communications as a political tool is an issue I have explored elsewhere. "Government By Television: Case Study, Perspectives and Proposals," Address by Commissioner Nicholas Johnson Before the Intern'l Ass'n of Political Consultants Third Annual World Conference, London, England, Dec. 14, 1970; *see* Lydon, *"Government by TV" Charged by Johnson of F.C.C.*, N.Y. Times, Dec. 14, 1970, at 79, col. 1.

101 PRESIDENT'S ADVISORY COUNCIL, *supra* note 97, at 53.

102 The council is heavy on business representatives and noticeably lacks any administrative law experts or any well-known consumer advocates. In addition to Ash, the council includes: former Texas Governor John B. Connally, now the Secretary of the Treasury; Frederick R. Kappel, chairman of the executive committee of American Telephone & Telegraph Co.; Richard M. Paget, president of Cresap, McCormick & Paget, a management consulting firm; Walter N. Thayer, president of Whitney Communications Corp.; and George P. Baker, former dean of the Harvard Graduate School of Business Administration. Mr. Baker did not participate in the regulatory reform studies, since he serves on many boards of companies involved in the regulatory process. *Nixon Sends Up Ash Balloon, supra* note 98, at 25.

doesn't like to be regulated." [103] While the agencies surely need reforming, the columnist went on to say, "the public had better keep a watchful eye to make sure the fox doesn't redesign the chicken coop." [104]

A NEW FIDELITY TO ESTABLISHED FORMS

I propose a rather different approach to the task of reform. This approach would not shuffle the bureaucratic organization charts into new forms with the same old hands in charge,[105] would not abolish the commissions, and would not assign their tasks to the already overburdened court system. When lawmaking is needed there is no known substitute for a strong commission properly imbued with a firm legislative mandate and vigorous powers to prosecute, legislate, and judge. Regulatory experience at the National Labor Relations Board, and to a lesser extent at the Securities and Exchange Commission, bears this out.

Improvement is needed, but the remedies are not those that are so often discussed. There is nothing wrong with the regulatory theory at bottom, just as there is nothing wrong with democracy itself in theory. What democracy needs is nothing more than activation: reapportionment, voter registration, and informed citizen discussion. Likewise, what the regulatory agencies most need is not so much new theory as new fidelity to established forms. First, the commissions need more independence. Second, stronger public-interest advocates are needed, and they must have fair opportunity to participate in regulatory decisionmaking. Third, the agencies' fundamental capacity to plan, innovate, and administer must be recast. Finally, agencies must be subjected to closer scrutiny by the press, the judiciary, and the legislature. Reform directed toward the fulfillment of these needs will begin to develop true participatory democracy in our commissions.

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[103] Anderson, *Nixon Bent on Regulator Overhaul*, Washington Post, Sept. 12, 1970, § C, at 13, col. 5.

[104] *Id.* Mr. Anderson believes that the overhaul would produce a "timid hierarchy of reluctant regulators." *Id.* He notes that the "special interests simply don't like to be regulated, and in return for their campaign contributions, Mr. Nixon sympathized with them in 1968. He wrote a private letter to stockbrokers, delivered a campaign pitch to oilmen and gave personal assurances to other business tycoons that he would end 'government by harassment.'" *Id. See also* Williams, *Fifty Years of the Law of the Federal Administrative Agencies—And Beyond*, 29 FED. B.J. 267, 278-79 (1970). Professor Williams, an administrative law expert, concludes that the Ash and Elman proposals will have minimum impact. He believes that "the administrative agencies as we know them" will continue to operate pretty much as they are now constituted. *Id.* at 278.

[105] Former FCC Commissioner Kenneth Cox, who finished his term on Sept. 1, 1970, said: "I don't believe there's any need for substantial reorganization of the FCC. It would kill a single man trying to do the things we do." Block, *What It's Like Inside the FCC*, TELEPHONY, Sept. 5, 1970, at 56, 60.

GREATER INDEPENDENCE

The original theory behind the "headless fourth branch" was to endow the commissions with sufficient independence to allow them to successfully pursue the public interest.[106] We have lost sight of this original goal of independence. In 1969, the ABA report on the Federal Trade Commission noted that one of the qualities the commission needed most was "sufficient strength and independence" to resist pressures from Congress, the Executive Branch, or the business community that "tend to cripple effective performance." [107] In theory there is independence, but it does not exist in reality. On Capitol Hill, Sam Rayburn's admonition to young Congressmen, "To get along, go along," has long been the watchword for success and this is doubly true of the so-called "independent" regulatory agencies.[108]

There is substantial question whether personnel dedicated to serving the public interest are welcome at the FCC—or elsewhere in Washington for that matter. The current administration strengthens this doubt with its unusual boast that the hallmark of its appointment policy is "political emphasis," [109] perhaps at the expense of expertise, independence, and diversity of views.[110] For example, Commissioner Kenneth A. Cox's term at the FCC expired on June 30, 1970. Despite his being one of the ablest, fairest men ever to serve on the Commission,[111] no one expected

106 *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-86 (1965).

107 AMERICAN BAR ASS'N COMM'N TO STUDY THE FEDERAL TRADE COMMISSION, REPORT 35 (1969).

108 *See* ASS'N OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMM. ON CONGRESSIONAL ETHICS, CONGRESS AND THE PUBLIC TRUST 141-42 (1970). The recent disciplining of Representative Sam Steiger, for remarking on a network radio show that he had seen some of his fellow representatives "drunk during the day" shows the vitality of the precept. N.Y. Times, Feb. 6, 1968, at 25, col. 3.

109 Lydon, *Administration Is Stressing Political Loyalty for Jobs,* N.Y. Times, Sept. 9, 1970, at 30, col. 3.

110 The Administration also stresses industry loyalty more than consumer loyalty in FCC matters. J.W. Roberts of Time-Life Broadcast in Washington and president of the Radio and Television News Directors Association, reports on a luncheon conversation he had with Herbert G. Klein, Director of Communications for the Nixon Administration: "Klein maintained that the real way to determine the Nixon Administration's attitude toward broadcasters is from its appointments to the Federal Communications Commission, not through its speeches. And he posed the question—aren't the two Nixon Administration appointees good men, from the industry point of view?" Roberts, *President's Message,* RTNDA BULLETIN, Jan. 1970, at 2.

111 One respected independent observer refers to him as the "outstanding regulator." M. MAYER, THE LAWYERS 345 (1966). In the words of a Washington lawyer, "Ken Cox lacks one of the fundamental things in our society: He isn't a complete man; he isn't greedy." *Id.* at 345-46.

For a sample of Commissioner Cox's high standards of scholarship, see his review of the FCC's work and regulation through the 1960's. Cox, *The Federal Communications Commission,* 11 B.C. IND. & COM. L. REV. 595 (1970).

that he would be reappointed. Commissioner Cox was not reappointed because he refused to follow the industry line in his opinions and votes at the Commission, subjecting himself to unending trade press attacks. It is a President's prerogative to appoint whom he wishes to a regulatory agency, but for an agency which must perform in a nonpartisan way in the heart of the political process, it is distressing that partisanship enters into the appointment of its members. President Lyndon Johnson had no difficulty in reappointing Republicans to the Commission, in fact naming a Republican chairman, Rosel H. Hyde.[112] But good public service is apparently not to be rewarded in Commissioner Cox's case. And so the message goes out: If you want to stay in your job, or move ahead, don't cross strong vested interests.

Even more revealing are President Nixon's first two appointments to the Commission. Chairman Dean Burch, his first appointment, ran Barry Goldwater's 1964 campaign for the presidency and later became Chairman of the Republican National Committee.[113] The press reported that "Burch's appointment was hailed by broadcasters who were seeking a chairman to protect their interest as businessmen." [114] Robert Wells, Nixon's other appointment, was a lifetime broadcast owner active in the National Association of Broadcasters, the largest lobby organization representing broadcasters.[115] Wells, who is reported to have political ambitions in his home state of Kansas, makes no secret of his support for the industry he is charged with regulating, acknowledging that his views on broadcasting were formed by his participation in the business. In his view, whatever is best for the industry is best for the general public.[116]

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112 Rosel Hyde, an Idaho Republican, was nominated in the first instance as a Republican member of the Commission by President Truman in 1946. He was renominated by President Truman in 1952 and renominated by President Eisenhower in 1959. President Johnson named Mr. Hyde Chairman of the FCC on June 18, 1966. *See Hearings on Sundry Nominations Before the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 13 (1966); 112 CONG. REC. 13,617 (1966) (remarks of Senator Bennett) (nomination); 112 CONG. REC. 14,417 (1966) (confirmation).

113 *See Sketches of Federal Communications Commissioners*, 1 NATIONAL JOURNAL 236 (1969).

114 Aug, *Burch-Wells Likely to Shift Delicate FCC Balance*, [Washington] Sunday Star, Dec. 7, 1969, § B, at 6, col. 1.

115 Commissioner Wells brings to the FCC more than 30 years of experience in broadcasting. From 1961 until he was appointed to the FCC, Commissioner Wells was general manager of the Harris Radio Group which has interests in Kansas, Iowa, Illinois, and Colorado. *See Sketches of Federal Communications Commissioners, supra* note 113.

116 Drew, *Dean Burch Watches Television*, WASHINGTON MONTHLY, May 1970, at 69, 73. Mr. Wells has said that he doesn't know how one "can separate the interests of the citizens and the interests of the broadcasters." *Id.*

Much could be done to restore the independence of our agencies. A prestigious citizens' committee, like Common Cause or any alliance of national citizens' action groups, could keep and publicize lists of recommended commissioners for the various regulatory agencies, much in the way the organized bar now screens judicial appointments for the President and Congress. Commissioners selected after such screening would be more responsive to, and representative of, the broader public; the commissions then would be representative enough to include black commissioners, female commissioners, academicians, the poor, youth, and the numerous other elements of contemporary society that are now wholly shut out of the regulatory process.

On another level, it is clear that staff improvements could contribute greatly to strengthening commission independence. In general, entrenched bureau chiefs and agency co-ordinators dominate decision-making at the FCC and, I suspect, at the other agencies as well. There is a positive, although understandable, disinclination on the part of agency staff to present alternatives to commissioners for their consideration. On those rare occasions when the staff is unable to work out their own compromises on important questions before presentation to commissioners, the resulting staff disagreement is discouraged. It should not be. The staff should be allowed the formulation of alternative and dissenting views so commissioners have the full panopoly of options open to them when they determine major issues.

Giving commissioners salaries comparable to the captains of industry they are supposed to regulate, as well as adequate pensions, would contribute to greater independence. Many civil servants now perform in the agencies with one eye on their future job in the industries they are supposedly monitoring. Compromises are inevitable, and public interest is bound to suffer. Comparable salaries and adequate pensions would allow the President and Congress to recruit more competent regulators, and, in turn, bar the regulators' return to the industries they regulate after a period of government service.

With the public interest so guarded, there would be no need to strip the agencies of their adjudicatory functions for reassignment to the courts. If the commissioners were truly independent, and consumer advocates were participating actively, in fact as well as in theory, commissioners would be insulated from the venal influence of vested interests and would be free to work as true judges on behalf of the public interest.

GREATER CITIZEN ADVOCACY

Our regulatory process decidedly needs more strong and independent

public interest law firms in order that the law's vaunted adversary process can be balanced in fact, instead of gruesomely dominated, as it now is, by the corporate positions.[117] True citizen advocacy is at its best when it is truly independent of the political process, both in spirit and in funding. This to a large extent explains the effectiveness of Ralph Nader who accounts to no one, inside or outside government, save himself. Although citizen advocates within government itself are necessary, government lawyers are more conscientious in serving the public when men like John Banzhaf and Ralph Nader are calling them to account. Such independent citizen advocacy must be cultivated.

Some believe that the best hope lies in the establishment of Public Counsel Corporations, Utility Consumer Counsels, and Consumer Affairs Departments within the existing governmental structure.[118] I am less than optimistic that such groups would succeed in providing stronger representation for the general public. As the current plight of the Office of Economic Opportunity's Legal Services Program amply illustrates, government lawyers are not truly independent.[119] Public interest lawyers within the governmental structure simply would be too

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117 "Public Interest Law" is a movement within the legal profession that addresses the problem of confidence in the adversary process, a crucial element in the American way of law. The public interest may be obscured or poorly served if all parties cannot command competent legal representation in judicial and administrative proceedings affecting the environment, the consumer, and the economically or socially disadvantaged.

Counsel for the Public, FORD FOUNDATION LETTER, Oct. 3, 1970, at 3. *See also* Riley, *Objection!*, THE WASHINGTONIAN, Nov. 1970, at 53; Sax, *Environment in the Courtroom*, SATURDAY REVIEW, Oct. 3, 1970, at 55; Sax, *The Search for Environmental Quality: The Role of the Courts*, in THE ENVIRONMENTAL CRISIS 99 (H. Helfrich ed. 1970). Derek Bok, the new president of Harvard University and former dean of the Harvard Law School, sees a dim future for public interest law firms. "Public interest law firms offer brighter prospects for exciting, challenging work, but the outlook is bleak for finding financing for more than a handful of such positions." Bok, *New Lawyers in Old Firms*, N.Y. Times, Feb. 3, 1971, at 35, col. 3. Law firms have recently been active in working more public service time into the more traditional, business-oriented practice of law. *See* Note, *Structuring the Public Service Efforts of Private Law Firms*, 84 HARV. L. REV. 410 (1970).

118 Senator Edward Kennedy has been a prominent proponent of this idea. *See* S. 3434, 91st Cong., 2d Sess. (1970); S. 2544, 91st Cong., 1st Sess. (1969) (Public Counsel bills). *But see Hearings on S. 3434 & S. 2544 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 19 (1970) (statement of FCC Commissioner Nicholas Johnson). For more detail on the proposal for an independent consumer council, see *Hearings on S. 2959 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969).

119 Branch, *The Ordeal of Legal Services: How Poor People Won in Court But Lost in OEO*, WASHINGTON MONTHLY, Jan. 1971, at 3. The article details what happens to government lawyers when they are "too conscientious" about serving the public interest.

vulnerable to the more venal influences of politics and special interests to represent the general public adequately.[120]

Recent decisions expanding the law of standing undoubtedly will provide increased access to the new consumer advocacy. Five years ago, the United States Court of Appeals for the District of Columbia Circuit broadened the law of standing in *Office of Communication of United Church of Christ v. FCC*[121] to include responsible members of the listening public. But the Commission, in a decision as late as 1969, ignored the direction of the courts and denied standing to a challenger of the license of a network-owned station because he was outside of the listening area of the station.[122] In dissent, I argued that since the Commission has an affirmative obligation to find that the broadcaster has served the public interest before renewing his license, we should not apply a formal law of standing to exclude any member of the public who can help us in our determination.[123] Anticitizen attitudes are becoming increasingly anachronistic. The Supreme Court, in two recent significant standing cases, has added impetus to the growing trend.[124] The Court ruled

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120 I have elsewhere proposed the "People's Lawyers Fund." *See* Johnson, *The People's Lawyers Fund and Other Hopes,* FCC Public Notice 60158, Dec. 8, 1970 (speech upon accepting the Second Annual Public Defender Award of the NEW REPUBLIC). In that Address, I proposed:

> If there is a Senator, member of Congress, or lawyer who would like to do some really cost effective lawyering on behalf of the public interest, let's devise a way to provide economic support for those lawyers—young and old—who would *like* to do public interest work but need some remuneration, however modest. Let's call it "The People's Lawyers Fund." The legal talent that such a law or other proposal would free up would be equivalent in one year to hundreds or thousands of lifetimes of public interest legal work by the guy who drafts it.
>
> What precedent is there for such a proposal? How about the contingent fee arrangement for personal injury cases? That was novel, and of questionable "ethics," when first proposed. And yet, who would deny that for lawyers to get fees for personal injury work only as a proportion of the client's award—and only if he wins—has enabled thousands of injured persons to receive good legal representation, and thousands of lawyers to practice personal injury law, who would otherwise have been unable to do so.

Id. at 9.

121 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).

122 National Broadcasting Co., 20 F.C.C.2d 58, 17 P & F RADIO REG. 2D 563 (1969).

123 *Id.* at 61-64, 17 P & F RADIO REG. 2D at 567-75 (Johnson, dissenting).

124 Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). This liberalization was continued in the present term. *See* Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (section four of the Bank Service Corporation Act "arguably brings a competitor within the zone of interests protected by it"). A court, normally of course, will not decide a constitutional challenge unless the challenger has "standing" in the sense that he is in a position to demonstrate a concrete stake in the outcome of the suit and a direct impairment of his own rights. The concept, nevertheless, is very flexible. It has steadily developed in

that vendors of data processing services have standing to challenge the Comptroller of the Currency's ruling allowing national banks to make data processing services available to other banks and bank customers,[125] and that tenant farmers have standing to challenge the Secretary of Agriculture's regulation permitting the assignment of their upland cotton program benefits to their landlords in order to secure the payment of their cash rent.[126] Mr. Justice Douglas, speaking for the majority, went far beyond the taxpayer standing suits. The essence of standing, he said, could be reduced to two questions: (1) whether a "case or controversy" is presented as required by Article III of the Constitution, such adversary context interpreted broadly to cover economic or other kinds of injury; and (2) whether the interest asserted by the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." [127] The Court noted that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." [128] Justice Douglas emphasized that economic injury is not required, that standing may stem equally from noneconomic injury to aesthetic, conservational, recreational, and spiritual values.[129]

This new standing trend may be just the boost needed to get the growth of public interest law firms irrevocably underway. Under its impetus, Common Cause, or some other broadly based citizens' group, could begin watching the watchdogs on behalf of the people. Common Cause could use part of its resources to fund talented young citizens' lawyers, in effect private attorneys general, to participate in the ad-

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recent years from a narrow "economic injury" test to a more liberal standard which recognizes noneconomic injuries and values. *Compare* Frothingham v. Mellon, 262 U.S. 447 (1923) *with* Flast v. Cohen, 392 U.S. 83 (1968) *and* Office of Communication of United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966) *and* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, Consolidated Edison Co. v. Scenic Hudson Preservation Conf., 384 U.S. 941 (1966).

[125] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152, 157 (1970). Professor Jaffe has written that the *Data Processing* and *Arnold Tours* decisions "reflect, I think, the Supreme Court's feeling that the Comptroller of the Currency is too 'bank-minded' to enforce statutory limitations on banking operations." Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 638 (1971). A similar charge has been made against the FCC. Chief Justice Burger, then a judge on the United States Court of Appeals, noted a curious "neutrality-in-favor-of-the-licensee" attitude that pervades FCC activity. Office of Communication of United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 334-40, 359 F.2d 994, 1000-06 (1966).

[126] Barlow v. Collins, 397 U.S. 159, 164-65 (1970).

[127] *Id.; see* Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-53, 157 (1970).

[128] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970).

[129] *Id.*

versary process. What the nation needs is a thousand Naders, not just one, with hundreds of thousands of dollars.

Citizen participation in the administrative process may be improved in other ways. Not long ago, the Illinois Commerce Commission toured all over the state and listened to telephone customers by the hundreds.[130] As a result, the Illinois Commission refused to grant a rate increase until multiparty rural telephone service was upgraded.[131] There is no reason why this approach could not work in the federal commissions.

As it now stands, the FCC and its sister agencies play only passive roles, waiting for citizens to come in and present their views.[132] The commissions could make fact-finding tours through communities with problem situations as congressional committees have done on issues concerning hunger, Indians, welfare, national parks, civil rights, and other pressing social problems. Such hearings at the local level would insure that the citizen is not shut out of our regulatory process.

The commissions' internal investigatory facilities can be improved as well. When citizens do file complaints, the FCC, and I suspect others too, gives them cursory and unresponsive treatment. Complaints may be ignored altogether or dismissed with unhelpful and discouraging "boilerplate" replies. At least at the FCC, this is not the fault of a staff which includes some of its ablest and most dedicated employees. Much of this is due to the commission's lack of investigative personnel, time, and money.

Because citizen groups often lack the experience and financing necessary to obtain top quality legal assistance, the commissions should develop procedures whereby private law firms could contribute this assistance. As Ralph Nader told a Senate subcommittee: "The strongest case can be made for actually requiring that the 300 top lawyers in Washington—already rich beyond the dreams of avarice—spend all their time representing the public interest. This is on the same level as telling people to stop what they are doing and put out fires, or stop what they are doing and fight an epidemic, or stop what they are doing and save the country." [133] Short of this measure, the commissions could initiate

130 Armstrong, *Focusing on Regulatory Issues*, PUBLIC UTILITIES FORTNIGHTLY, Aug. 27, 1970, at 17.

131 *Id.*

132 *See* Margolis, *FDA: The Sugar-Coated, Polyunresponsive, Indigestible Placebo*, WASHINGTON MONTHLY, Jan. 1971, at 50. "Whatever the reasons for FDA's stoicisms, it encourages the illusion among consumers that they are getting ample protection, and probably hampers whatever reform movements are happening outside government to try to make up for what government doesn't do." *Id.* at 57.

133 Lydon, *A Public Counsel Is Kennedy Goal*, N.Y. Times, July 22, 1970, at 24, col. 1.

many worthwhile voluntary systems. We should consider asking law firms' younger attorneys to contribute their assistance *pro bono*. This is often done in the criminal law, and there is no good reason why it might not be established as well in administrative law where the issues involved affect the daily lives of millions of Americans.

In particularly important cases, the commissions could ask attorneys or professors experienced in the law of that commission to represent the parties or submit amicus curiae briefs. The landmark decision of *Gideon v. Wainwright*,[134] establishing the right of an indigent in a criminal proceeding to obtain the services of an attorney, was precisely such a case. In that case, the Supreme Court asked an attorney to represent the indigent defendant and present the issues to the Court.[135] Perhaps similar appointments by the FCC in license transfer or renewal cases, telephone company rate regulation proceedings, or CATV rulemaking proceedings, might provide the presently "indigent" American public with analogous representation.

The agencies at least should request "amicus" briefs from independent sources. If this proves insufficient, we might even consider establishing a "legal aid" bureau within each of the commissions separate from all other bureaus.[136] This bureau could employ qualified lawyers trained to act as ombudsmen between citizens and their regulatory commissions.[137]

Better informed citizenry would result in more citizen advocacy. Radio and television public service announcements could be prepared by the commissions to inform the public of commission policies and to announce forthcoming adjudicative and rulemaking proceedings of wide importance.[138] Similar notices could be run in newspapers and magazines. Direct mailings could be sent to all public-oriented interest groups, informing them of the commissions' actions. The agencies could draft and disseminate regulatory "primers" on how to present one's views to the various agencies.

PLANNING AND ADMINISTERING

The Ford Foundation completely changed the course of communications history by its filing in the Commission's domestic satellite proceed-

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134 372 U.S. 335 (1963).

135 Gideon v. Cochran, 370 U.S. 932 (1962).

136 I recently had a chance to discuss these ideas thoroughly before a Senate subcommittee. *See Hearings on S. 3434 & S. 3544 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 19 (1970).

137 *Id.*

138 *See* note 54 *supra* and accompanying text.

ing which called attention to the need for funding of public broadcasting as well as for satellites.[139] The Carnegie Commission on Public Broadcasting also had a significant impact.[140] There are now several independent groups studying the public policy issues in cable television.[141] These efforts cannot help but make for decisions more attuned to public needs, but it is regrettable that the Commission itself is not doing any of these studies.

Our commissions must develop strong, central policy planning bodies capable of anticipating impending problems and formulating programs to meet more than today's needs. Policy planning must be accepted as a full-time operation requiring a high-level staff including economists, program planners, systems analysts, and others.

Our policy planning functions should also involve citizen participation. I intend to recommend to my colleagues that we put forward a five million dollar program in which we ask community groups to make proposals for experimental use of cable as a way of testing and developing what all recognize as a fantastic potential for community service.[142] Such pilot project expenditures might make a greater contribution to wise public policy than all the studies that can or will be done, and these experiments are unlikely to be done by private interests seeking favorable government action. Government grants for experimental cable development would be analogous to HUD grants to companies for the development of "breakthrough" housing techniques to meet the housing crisis in this country.[143] Experimental cable development grants which directly involved grassroots citizen support would represent true citizen advocacy and citizen representation in federal rulemaking activities.

Another reform would be to approach, through an agency department, a great citizen resource normally ignored by the commissions: the

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139 The Establishment of Domestic Communications Satellite Facilities by Non-governmental Entities, FCC Docket No. 16495, Aug. 1, 1967 (Ford Foundation Statement).

140 CARNEGIE COMM'N ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION (1967).

141 Among these are the Rand Corporation, Santa Monica, Calif., and the Sloan Foundation, New York, N.Y.

142 *See generally* Amendment of Part 74, Subpart K, of the Commissions Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communication Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, FCC Docket Nos. 18397-A, 18892, 18893, 18894 (June 24, 1970).

143 *See* U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, OPERATION BREAKTHROUGH: QUESTIONS AND ANSWERS (Oct. 1970). The program Operation Breakthrough concentrates on research and development of pilot projects in experimental housing. *Id. See also* Arnold, *Mr. Romney's "Breakthrough": Rolling Houses off an Assembly Line*, National Observer, June 2, 1969, at 1, col. 1.

academic community.[144] There is no office in the FCC that has the function of liaison with the research and policy analysis efforts undertaken in the academic community. Case materials are often unavailable to students of the commission or so prohibitively expensive that only well-heeled private interests can afford to acquire them. The FCC would benefit greatly from an organized program seeking out and encouraging those in the academic community whose interests and skills are particularly oriented to communications policy questions.

To effectively implement these reforms we must also improve our capacity to administer. It is no secret that the Commission is creaking along with an antiquated management system. To date, we have no effective management-information-reporting system for our internal use. Staff working conditions are poor at best; young attorneys often are crowded three into a room under conditions hardly designed to produce high-caliber work. We do not even have an inventory.[145] We cannot expect to regulate industry adequately until we learn to govern ourselves.

PUBLIC AND GOVERNMENTAL REVIEW

There is abroad today a far too facile assumption by press and Government alike that, on a broad range of public policy questions, the public is just not to be trusted with a knowledge of what is going on.[146] This notion strikes at the deepest roots of our democratic process. The denial of information which a person needs in order to have a rewarding existence—or to even survive—in our modern, complex society can have as important an effect on a person's life as years of imprisonment.

"All governments," NBC newsman Sander Vanocur observes, "wind up lying deliberately or inadvertently because they have to justify their

144 The Commission is now experiencing the impact of one particularly effective academic consultant, Dr. Barry G. Cole, a 32-year-old professor at Indiana University's radio-television department, who is researching the FCC's renewal process for a book he is preparing. The Commission has asked Dr. Cole to become a part-time consultant, and to date his work has focused new attention on the Commission's ineffective renewal procedures. *See Chance of Reform in License Renewals,* BROADCASTING, Sept. 21, 1970, at 21; *A Move toward 'Standards' on Renewals,* BROADCASTING, Oct. 12, 1970, at 21; *Stronger Role for Citizens' Groups,* BROADCASTING, Dec. 7, 1970, at 15.

145 I recall one particularly startling incident that occurred just after I had arrived at the Commission. I went down to the supply room because I was out of pencils. The Commission, an agency of some 1,500 employees, was out of No. 2 pencils and did not know it for lack of an inventory. We did not even know what pencils we did have in stock. *See* Young, *Blunt Words From an FCC Commissioner,* National Observer, Dec. 14, 1970, at 7, col. 1.

146 *See* Request by Robertson & Winkler, 25 F.C.C.2d 942, 943, 20 P & F RADIO REG. 2D 377, 379 (1970) (Johnson, concurring).

policies." [147] It is the media's job to keep government honest. If we are going to keep the watchdog agencies honest, the press as well as the public must have access to the bureaucratic process of settling issues and making decisions. Bureaucrats frequently pay lip-service to the press and its first amendment rights, congratulating ourselves that we have a free press vigorous enough to search out the governmental goldbrickers, the public policy bumblers, the pennyante politicians, and the lawyer-lobbyists who champion the corporate interests. Yet, in the regulatory agencies, free press is free in little more than name. The Freedom of Information Act,[148] designed to give citizens access to information about their commissions, has actually been hung by its many loopholes.[149] Again, the theory is there, but when information is selectively withheld from the public, and policy pronouncements are drowned in a self-serving trade press, the free-press theory quickly evaporates into an illusion.

The press, though, can still be potent. The Federal Power Commission was caught recently in a squabble over public information that is characteristic of an increasing trend. Consumers demanded that the FPC make public the information the agency had acquired on natural gas reserves of companies operating in Louisiana. The accuracy of the information on natural gas reserves had been at issue for over a year, since the FPC's announcement, after studying industry furnished data, that the fuel was in short supply, and the industry's use of this occasion to ask for a rate hike that could double the price gas producers get for the fuel. Consumers were understandably outraged. They feared that their government was about to act without giving them a chance to challenge the corporate reasons why.[150]

At the FCC, the public also suffers from information discrimination. The Commission is infamous for its leaks of private information, which flow down a direct and much-used pipeline to broadcasters, trade press, and lawyer-lobbyists who have built lucrative careers on getting and using it before the public does.[151]

If the public interest is ever to be served, the agencies must be opened to press and public alike so that citizens may have a better idea of what

147 *It's Our Job to Keep the Gov't Honest: Vanocur*, VARIETY, July 22, 1970, at 1, col. 2.

148 5 U.S.C. § 552 (Supp. V, 1970).

149 *See generally* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970).

150 *See* Vienna, *Consumers Ask FPC Gas Data*, Washington Post, Sept. 9, 1970, § E, at 2, col. 3. *See also* Vienna, *FPC Refuses to Delay Action on Gas Rules*, Washington Post, Sept. 16, 1970, § B, at 11, col. 3.

151 *See* Request by Robertson & Winkler, 25 F.C.C.2d 942, 20 P & F RADIO REG. 2D 377 (1970).

is being done for and to them. The sooner the agencies dispense with many of the unneeded "executive sessions," secret staff documents, closed meetings, and industry-oriented oral presentations and allow reporters and television cameras into our meetings—the sooner we amend the Freedom of Information Act to make it effective or simply attempt to carry out its original high aims—the sooner the commonweal will begin to emerge.

Complementing the role of the press are the legislative and judicial roles. The continuing threat of congressional investigation of the commissions and congressional reprisals against commission activity always exists where Congress has delegated broad power, such as the FCC's responsibility to regulate the communications industry consistently with public convenience, interest, and necessity.[152] Congress still wields considerable influence over day-to-day FCC decisionmaking.[153] This affords some legislative direction, albeit crude and haphazard, on a continuing basis. Reform of our regulatory system should include the development of legislative methods for more systematic review of regulatory activity. Such review should evaluate both the agency's effectiveness in pursuing the public interest and the possible need for further legislative mandate.

For similar reasons we must educate the judiciary further as to their role in the regulatory process. Where an agency wanders from the regulatory path mapped by Congress, it is the judiciary's responsibility to discipline the errant regulators.[154] Some of our courts have recognized this responsibility. The high federal appeals courts, principally the United States Court of Appeals for the District of Columbia Circuit, have had an increasing impact on federal agency law. Describing the D.C. Circuit, one writer notes:

> The judges have played an increasingly adventuresome role. They have repudiated the myth that courts are inherently less "expert"

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152 Federal Communications Act of 1934, § 303, 47 U.S.C. § 303 (1964); *see* L. JAFFE, *supra* note 106, at 48.

153 Krasnow, *The 91st Congress and the FCC*, VARIETY, Jan. 6, 1971, at 73. For example, the Commission was prompted to reverse its decisions in two instances during the 91st Congress as a direct result of congressional investigations. After reviewing materials furnished by the Special Subcommittee on Investigations of the House Interstate and Foreign Commerce Committee, the FCC ruled that hearings be held on the transfer of control of five television permittees—a transaction earlier approved by the FCC. D.H. Overmyer Communications Co., 25 F.C.C.2d 442, 20 P & F RADIO REG. 2D 1. The Commission also reopened hearings on the renewal applications of WIFE-AM-FM, Indianapolis, and three other stations under common control, to investigate many charges, including abuses in the sale of political advertising. Star Stations of Indiana, Inc., FCC No. 70-1256, FCC Docket No. 19122, vol. II (Dec. 3, 1970).

154 *See* L. JAFFE, *supra* note 106, at 26; Lazarus, *Defending Consumers*, NEW REPUBLIC, Sept. 26, 1970, at 10.

> than administrators and should therefore defer to their judgment. They have obliterated the hoary doctrines which restricted the parties who have legal "standing" to sue to upset administrative decisions. The judges have often used individual administrative cases brought to them, as occasions on which to lay down broad mandates to the agencies with respect to the public interests.[155]

Increased awareness within our judiciary of their important role would further guarantee the fidelity of our agencies to the independent regulatory ideal.

CONCLUSION

Seldom since the nation's grangers and shopkeepers marched on state legislatures in the 1870's to demand protection from excessive railroad rates has the tide of consumer dissatisfaction run so high in this country. The people are aware of their Government's failure and are demanding change.

While no one American institution is singularly at fault, our regulatory system must accept a major portion of the blame.[156] As originally conceived, this system was to protect the consumer. The theory has not been allowed to work. Over the last half century, the regulatory process has become frozen while the regulated industries have developed around the commissions, and engulfed and dominated the very agencies that were established to keep the corporations in line.

This failure stems largely from several fundamental inadequacies. Our agencies lack the necessary facts for objective and intelligent decision-

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[155] Lazarus, *supra* note 154, at 11.

[156] Apparently we cannot count too heavily on the packages of consumer legislation currently being wrapped up by Congress. Under the pretty ribbons, the consumer experts say, the Congressional-White House plans are little more than empty boxes. *See Drive to Protect the Buyer*, U.S. NEWS & WORLD REP., Jan. 18, 1971, at 20.

Indeed, the failure of our regulatory commissions is but a part of the failure of government as a whole. Many fundamental institutions of Government, including the Congress and perhaps even our constitutional superstructure. One of the young "new lawyers" expresses it best: "[M]uch more is askew than the regulatory system. The failure of the grand design touches all American institutions—regulatory agencies, Congressional bodies, courts, corporate entities, universities—none has been successful in insuring the highest quality of life possible for the most number of people. All have fallen far short of their professed goals." J. TURNER, THE CHEMICAL FEAST 252 (1970) (Ralph Nader's study group report on the Food and Drug Administration). The Center for the Study of Democratic Institutions at Santa Barbara, California, has developed an exciting draft model for a new constitution, its purpose being to stimulate discussion and to help the public "understand the U.S. of the seventies." *See* Graham, *Study Center Offers a New U.S. Constitution*, N.Y. Times, Sept. 8, 1970, at 1, col. 1. For a text of the document, see *Constitution for a United Republic of America*, CENTER MAGAZINE, Sept.-Oct. 1970, at 24.

making. The combined effect of inadequate investigative facilities, narrow standing rules, inadequate citizen representation, public ignorance of agency policy and action, and the agencies' failure to simplify their rules and encourage citizen participation have forced our commissions to rely on information eagerly provided by the regulated industries. Secondly, the thought processes of our agencies and their members tend to be dominated by the subgovernment phenomenon—an industry orientation produced by agency operation within a milieu exclusively occupied by people with an industry association. Third, our regulatory agencies, when they make decisions, tend to do so on an *ad hoc* basis rather than as an implementation of a conscious well-developed process. And the impact of these decisions is circumscribed because of delay in reaching them.

Critics have counseled us for decades with recommendations to abolish, dismantle, or sterilize the independent agencies.[157] The recent Elman and Ash proposals would strip the agencies of their adjudicative power and would replace the commission structure, at least to some extent, with a single administrative head. The Ash Council may be right on several counts. Perhaps the ICC, CAB, and Maritime Commission could be constituted constructively under one super transportation agency. The need for the other suggested reform, however, is far from clear.

I propose a rather different approach to this task of reform. There is no known substitute for our commission system when what is needed is a continuing, systematic supervisory authority. Regulatory history at the National Labor Relations Board, and to a lesser extent at the Securities and Exchange Commission, bears this out. What the regulatory agencies need most is not so much new theory as fidelity to established forms.

First, our independent commissions need more independence. Better salaries, staff improvements, and encouragement of the staff to present alternative proposals all would promote greater independence. More than anything else, however, we must minimize the political nature of appointments and emphasize the selection of those who are dedicated to vigilantly serving the public interest. The public trust would be in secure hands with a majority of Philip Elmans and Mary Gardiner Joneses at the FTC or a majority of Kenneth Coxes at the FCC. We therefore must consider methods whereby national citizen action groups like Common Cause might recommend and evaluate appointments.

Second, our regulatory system needs more citizen participation and advocacy. We could increase citizen participation in many ways: more fact-finding tours through communities with problem situations, in-

[157] For a current example of this genre of criticism, see L. KOHLMEIER, *supra* note 18.

creased facilities to investigate citizen complaints, regulatory primers, and media publication of important agency policies and significant proceedings. Perhaps most important would be measures taken to improve the quantity and quality of citizen representation. The agencies should consider asking law firms to contribute young attorneys for *pro bono* assistance or to submit amicus briefs representing significant citizen interests.

Third, we must recast the agencies' fundamental capacity to plan, innovate, and administer. We must develop strong central policy planning bodies capable of anticipating impending problems and formulating programs to meet more than today's needs.

Finally, our agencies themselves must be subjected to continuing scrutiny and evaluation. It is the media's job to keep government honest; our agencies must either develop a more cooperative attitude toward disclosure of information or expect amendments of the Freedom of Information Act which will make disclosure a reality. Similarly, sterner judicial and legislative review would keep the public interest more secure.

While these changes will not be accomplished overnight, we must begin now. If we permit the public dissatisfaction with our regulatory system, and in fact with most of our governmental institutions, to go unheeded government at all levels will only become more suspect. The American public might deservedly tell its various governmental entities what Cromwell told the Long Parliament in the 1640's during the revolt against the King:

> You have sat too long here for any good you have been doing.
> Depart I say and let us have done with you.
> In the name of God, go!